

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 11, 2008 Session

**SCARLETT REAGAN ASLINGER SAMPSEL
v. JOEL LEE SAMPSEL**

**Appeal from the General Sessions Court for Morgan County
No. 0029D M. Todd Burnett, Judge**

No. E2007-01331-COA-R3-CV - FILED MAY 5, 2008

Scarlett Reagan Aslinger Sampsel (“Mother”) and Joel Lee Sampsel (“Father”) were divorced in 2005. Mother was designated as the primary residential parent of the parties’ son (“the Child”), who currently is 14 years old. Approximately eight months after the divorce was granted, Father filed a petition for a change in custody claiming there had been a material change in circumstances and that designating Father as the primary residential parent was in the Child’s best interest. Following a trial, the Trial Court determined that due to the Child’s post-divorce behavioral problems and decline in grades, there had been a material change in circumstances and that it was in the Child’s best interest to designate Father the primary residential parent. Mother appeals claiming the Trial Court erred in both of these determinations. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
General Sessions Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Joe R. Judkins, Wartburg, Tennessee, for the Appellant, Scarlett Reagan Aslinger Sampsel.

John McFarland, Kingston, Tennessee, for the Appellee, Joel Lee Sampsel.

OPINION

Background

Mother and Father were married in December of 1989 and have one child, their son born in January of 1994. In November of 2004, Mother filed a complaint for divorce. Father counter-claimed also seeking a divorce. A final divorce decree was entered in October of 2005. The Trial Court's Final Decree granted the parties a divorce pursuant to stipulation in accordance with the provisions of Tenn. Code Ann. § 36-4-129(b).¹ As pertinent to this appeal, the Final Decree provides:

After the parties testified, and after a recess, the parties announced that they had reached an agreement regarding the Permanent Parenting Plan such that the [Mother] should continue to be the primary residential parent for the parties' minor child ...; the [Father] should have co-parenting time with the minor child during the school year every other week from Friday at 6:00 p.m. to Sunday at 6:00 p.m., and on Wednesdays of the week that he does not have the minor child with him for the weekend co-parenting time from the time that school is dismissed on that Wednesday until the time that school begins the following day, or until 8:00 a.m. the following day, if there is no school....

The Trial Court then set forth the remainder of the parties' schedule for co-parenting time by dividing up the holidays, summer vacation, etc. Mother was required to maintain health insurance on the Child, and Father's child support payment was set at \$614 per month. The Final Decree also provided that "all disagreements regarding the Permanent Parenting Plan shall be submitted to mediation by a neutral party chosen by the parties or the Court."

Apparently, things did not go well after the Final Decree was entered. In January of 2006, Father sent Mother a handwritten letter stating:

You are not following the parenting plan in many instances.
I am requesting arbitration of these infractions as spelled out in the parenting plan.

Please respond within ten (10) days, by mail, stating your agreement to arbitrate.

¹ Tenn. Code Ann. § 36-4-129(b) provides that "[t]he court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone."

Co-operation concerning [the Child's] care, well-being and happiness depends on our working together through this mediation.

By the time Father sent his letter, Mother had married Scott Clark. Father and Mr. Clark mix about as well as oil and water. Mother's response to Father's letter states:

All future issues concerning [the Child], me, or the Permanent Parenting Plan Order signed by Judge Paul Crouch, on October 28, 2005, must be communicated to Scott Clark. As my husband, and head of household to which [the Child] resides, Scott is the voice for all decisions reached within our family. Please do not communicate directly with me unless it is an event such as defined in Section VI (3) of the Permanent Parenting Plan Order. Scott can be reached at the following address and phone number.²

Due to Mother's explicit refusal to cooperate with Father, Father filed a Petition for Change of Custody about eight months after the Final Decree was entered. Father claimed that there had been a material change in circumstances such that a change in custody would be in the Child's best interest. Father claimed, among other things:

That [Mother] has moved the minor child to Oak Ridge, Tennessee, wherein he has had to change schools and friends. The minor child's grades have drastically dropped to C's, D's, and F's wherein before the move the child made A's and B's in school. The child is also exhibiting behavioral problems in that he has been suspended for fighting at school and had to serve an after school detention for stealing. The minor child has expressed to [Father] that he misses his friends and Grandparents all of whom reside in Morgan County, Tennessee.

Mother denied the pertinent allegations of Father's petition. Mother filed a counter-petition for modification. Mother claimed Father had violated the Permanent Parenting Plan on several occasions and encouraged the Child to make bad grades so Father could seek custody. Mother requested Father's co-parenting time be restricted and that it be supervised.

The trial was in April of 2007. After reviewing the entire trial transcript, we note that this is one of those discouraging cases this Court sees all too often where the adults in a child's life are apparently so caught up in their anger for one another that they are either oblivious or unmoved by their actions' negative consequences to the child. The vast majority of the trial testimony was

² Mr. Clark's address and phone number have been omitted from this Opinion. Section VI (3) of the Parenting Plan referenced by Mother addresses each parent's right "to receive notice and relevant information as soon as practicable but within twenty-four (24) hours of any event of hospitalization, major illness or death of the child."

devoted to making negative comments or casting blame on the other party. The Trial Court undoubtedly was in a difficult position trying to sort through the proof to make a decision. We will highlight the pertinent testimony.

At the time of trial, the Child was thirteen years old, and he was called as the first witness. The Child testified that he was in the seventh grade and attended Jefferson Middle School in Oak Ridge. The Child testified that he wanted to live with Father. According to the Child:

I like to go up to my dad's because I like to visit his house and see him, and he does a lot of stuff with me that my mom doesn't do. And I just really like going up there, getting to see all of my family and everybody.

The Child testified that Father takes him hunting and plays games with him, in addition to taking him to church where Father is a youth pastor. The Child stated that another reason he wanted to live with Father in Morgan County was because his grandparents live there. The Child also explained that Father is a teacher at Coalfield Middle School in Morgan County and that is where the Child would go to school if he lived with Father. The Child testified that he got along "very well" with his step-mother. When asked how he got along with his step-father, the Child responded "[a]ll right, but not really, I guess I could say that." The Child explained that he and his step-father get into arguments and they argue about "[l]ots of things." The Child gave an example of one such argument:

[O]n August the 6th, ... my dad was fixing to drop me off, and I went over to [Mother and step-father's] car and I said, "I'm going to stay another night," and they said, "No, you're not. Get back in the car." And I said, "No." And the police had to get involved. And then that night ... we got arguing, and I think my mom called my dad a piece of shit, and I said, "No, you're the piece of shit." And she goes, "You're going to turn out just like him. You're going to be a piece of shit," and then [she] went and got Scott.

And when she left I started reading my Bible, and Scott came in and said, "Put your Bible down." And I ignored him and just kept reading it, and he grabbed it from me and slammed it on my desk and he said, "You need to listen to me." And I said, "No, you're not my dad," and I got up, fixing to leave, and he held me back and he goes, "Come on, hit me right here." And I said, "I wish I would," but I didn't. And he got in my face and he went like that (indicating) pointing, yelling. I thought he was fixing to hit me. So I raised my arms up and he grabbed my arms and like wrapped my shirt around it and like threw me on the bed. And that's all I remember.

The Child further testified that he has heard his step-father call Father a “piece of shit” and other derogatory names. These slurs were made in front of the Child.

After transferring to the Oak Ridge School system, the Child’s grades declined. The Child received an “F” on a mid-term in English and a “D” in mathematics. The Child claimed school was a lot harder in Oak Ridge and he received the lower grades because he did not understand it. The Child acknowledged that he has had behavioral issues since he transferred to the Oak Ridge School System. He was suspended from school last year for stealing a bag of potato chips, which he stole because he was hungry and did not have any money. The Child also was suspended for fighting and given detention for asking who won another fight. The Child never was suspended when he attended school in Morgan County.

The Child testified that his step-father has two children. The Child stated that he did not get along well with his step-siblings and because of their arguments, “they switched our weekends, and now they only come every other Wednesday and every other weekend.”

On cross-examination, the Child acknowledged that Father told him that his bad grades would help Father obtain custody. The Child denied Father told him to make bad grades. The Child admitted that Father has said that he “dislikes” mother and her husband, but denied Father ever said he hated them. The Child testified that he would like to visit Mother as often as he currently visits Father. When asked how often he would like to see his step-father, the Child responded “[n]ot as often.”

Father testified that he has remarried and currently lives with his new wife and her two children. Father is a teacher with the Morgan County School System and also is a youth pastor at the Union Baptist Church in Morgan County. Father’s wife is employed with the Morgan County School System as well as the Methodist Medical Center in Oak Ridge. Father’s house is big enough for the Child to have his own bedroom if Father is the primary residential parent.

Father stated that when he has attempted to call Mother on the phone, she would not answer her cell phone. Although Father would leave a message, Mother never returns his calls. Father quit attempting to call the Child when he was at Mother’s. According to Father, he tried to call the Child for “many, many months . . . but I eventually gave up because it was no use.”

Father stated he does not have any sort of a relationship with Mother’s husband. Father stated that Mother’s husband is “very aggressive in his behavior and posture toward me” and that Mother’s husband flips Father “a bird” practically “every time he sees me.” Father has talked to the Child about his grades, but denied ever telling the Child not to do good in school. Father described the Child’s grades as unacceptable and stated that he would be able to tutor the Child. Father has tutored other students in the past. Father stated that, contrary to Mother’s allegations, the first thing he has the Child do when he gets home is to complete his homework.

Father testified that he and his wife and his stepchildren went to one of the Child's football practices. As the practice was concluding, Father shouted "good practice" to the Child. Mr. Clark also was present at the practice and shouted back at Father, stating "shut up and go home." After that practice, the Child asked Father not to return to any of his games.

Mother is employed at UT Batelle, as is Mr. Clark. Mother has had a security clearance for several years. Mother began having the Child go to a counselor after he stole the bag of potato chips. Mother felt like the Child needed help adjusting to his new school. The Child began counseling with Cookie Oakley and received counseling twice a month. Mother stated that sometimes she thinks the counseling helps, and at other times she does not. Mother was "not really sure" whether to continue the counseling.

Mother stated that there was only one instance where she said something derogatory about Father, and that was the incident previously described by the Child. Mother explained that the Child had refused to return to her home and Mother needed the police to intervene. The Child recounted something Father had said and Mother explained to the Child that was not true. That is when Mother called Father a "piece of shit" and told the Child she was afraid he was going to grow up and be just like Father. According to Mother, that evening:

Scott came in to talk to [the Child and the Child] raised up like he was going to rush at Scott, swing at him, and Scott grabbed his shoulders and pushed him back on his bed. His bed was right behind him. And it was just not allowed for him to act that way in our house.

Mother added that a few days after this event, the Child told her that Father had encouraged him not to go with Mother. Mother acknowledged that problems with the Child telling lies began when the parties were divorced, and it has continued to get worse.

After the divorce, Father had criminal charges brought against Mother for burglary. Apparently, Mother had returned to the marital residence to pick up a few things which she claimed she was entitled to based on the final decree. Because Mother's name was still on the deed, the burglary charges eventually were dismissed.

Mother described another incident when Father refused to return the Child to Mother. This incident occurred before the final divorce decree was entered. Mother claimed Father had intentionally scheduled basketball practice for the Child on one of the evenings Mother had the Child. Mother went to the gym to get the Child, and an argument ensued. As Mother was leaving with the Child, Father sat down and put his arms around the Child to prevent him from leaving. Then:

And, finally, he got back up. We were still exchanging words. He got back up. We got in the door of the gym, and I just pretty much

felt hopeless, and I rushed at [Father] and pushed him away from [the Child]. And, yeah, I pulled his shirt. I scratched him.

Following this event, Father obtained an order of protection which eventually was dismissed. Assault charges also were brought against Mother, to which she entered a nolo contendere plea.

Mother acknowledged that when the Child first changed schools, he received a “D” in one class and an “F” in another for one of the nine week periods. Mother added that she thought “he made a ‘D’ or an ‘F’ the last nine weeks of sixth grade also.” By the time of the hearing, Mother claimed that the Child’s grades had improved and he had not made anything below a “C”. Mother added that the Child also was participating in extracurricular activities and made many friends. Mother stated that, in her opinion, it was in the Child’s best interests for her to remain the primary residential parent. Mother claimed that the Child’s inappropriate behavior with lying, etc., gets worse the longer that the Child stays with Father.

There were two expert witnesses called on behalf of Mother, Cookie Oakley and Thomas P. Hanaway (“Hanaway”). Hanaway is a Clinical Psychologist with an office in Knoxville. Hanaway interviewed the Child on two occasions. Both sessions were for about 30 to 40 minutes. When the Trial Court rendered its opinion, it stated that Dr. Hanaway did not know enough about this case to really know what was going on. The Trial Court added that it did not find Dr. Hanaway’s testimony helpful. Mother does not challenge this assessment as to the lack of value of Dr. Hanaway’s testimony. Since the Trial Court did not accord this testimony much, if any weight, and because Mother does not challenge that assessment on appeal, we see no need to discuss Dr. Hanaway’s testimony in this Opinion.

The other witness called on Mother’s behalf was Cookie Oakley (“Oakley”), a licensed clinical social worker. The vast majority of Oakley’s testimony was essentially a repeat of Mother’s testimony and the various claims made by Mother against Father. During her testimony, Oakley acknowledged that she never interviewed Father. This understandably troubled the Trial Court. The Trial Court noted that, “as a professional, who professes to be as deeply concerned about the child as she was,” Oakley should have taken the time to hear Father’s side of the story. Accordingly, the Trial Court gave Oakley’s testimony little weight.

Following presentation of the evidence, the Trial Court found that there was a material change in circumstances and that it was in the Child’s best interest to designate Father as the primary residential parent. The Trial Court stated, *inter alia*, that:

[I]f you look at the total circumstances involved in this case and look at this young man’s performance, where he is; look at some of the issues, the problems he’s had; look at what he has asked this court to do, I think it makes a strong case for granting the petition to change custody of the child in this case. I am going to grant the petition.

* * *

I think that what we've been doing is not working. You know, we've had a counselor that's [been] meeting with this child for a year and a half, and it seems to be getting worse.... I am ordering that both parties attempt to agree on a new counselor for this young man to see and for both parties to see.

* * *

I'm just doing what I think is going to give this young man an opportunity to be happy and maybe work through some of these issues.

* * *

With regards to a material change in circumstances, this young man seemingly, and according to the testimony of [Mother and Oakley], has continued to have an increase in behavior problems. His grades ... have taken ... a turn for the worse and are not getting better. And I do believe that those issue alone are sufficient as a material change of circumstances.

* * *

But I think this child, for whatever avenue, is expressing his unhappiness in his [current] environment. And I think that's the basis for his acting the way that he is.

* * *

All I can do is rule on the things that I feel like are before me today. And certainly, you know, the fact that this child wants to live with his father is a consideration that I took. However, ... that was not the determinative factor.... [B]ased upon this child and his behavior and the other factors that we've talked about, that allowing him to live with his father, as he's requested, is at this point in time in the best interest of that child with regards to working through some of those issues.

Mother appeals claiming the Trial Court erred when it found that there had been a material change in circumstances and that it was in the best interest of the Child for Father to be designated the primary residential parent. Mother next argues, assuming she is successful with her

first issue, that the Trial Court erred when it refused to order that Father's co-parenting time be restricted and supervised.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The issue which obviously first must be addressed is Mother's claim that the Trial Court erred when it found there had been a material change in circumstances. Existing custody arrangements are favored since children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or those which were reasonably foreseeable when the initial decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, our Supreme Court has held that a trial court may modify an award of child custody “when both a material change of circumstances has occurred and a change of custody is in the child's best interests.” *See Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). According to the *Kendrick* Court:

As explained in *Blair [v. Badenhope]*, 77 S.W.3d 137 (Tenn. 2002)], the “threshold issue” is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 150. While “[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody,” the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change “has occurred after the entry of the order sought to be modified,” the change “is not one that was known or reasonably anticipated when the order was entered,” and the change “is one that affects the child's well-being in a meaningful way.” *Id.* (citations omitted).

Kendrick, 90 S.W.3d at 570. *See also* Tenn Code Ann. § 36-6-101(a)(2)(B) (“If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child....”).

The *Kendrick* Court went on to explain that if a material change in circumstances has been proven, “it must then be determined whether the modification is in the child's best interests ...

according to the factors enumerated in Tennessee Code Annotated section 36-6-106.” *Kendrick*, 90 S.W.3d at 570. It necessarily follows that if no material change in circumstances has been proven, the trial court “is not required to make a best interests determination and must deny the request for a change of custody.” *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999). If a material change in circumstances has been proven, when undertaking a best interests analysis Tenn. Code Ann. § 36-6-106 (a) requires the court to consider the following:

(1) The love, affection and emotional ties existing between the parents and child;

(2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;

(3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment ... ;

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

(7) (A) The reasonable preference of the child if twelve (12) years of age or older.

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person ... ;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person’s interactions with the child; and

(10) Each parent’s past and potential for future performance of parenting responsibilities, including the willingness and ability of

each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a).

The Trial Court was presented with much conflicting testimony. The primary conflict, however, centered around who was at fault, as opposed to whether the Child had developed behavioral problems, etc. Mother's main argument on appeal is essentially that Father was at fault for just about everything negative that has happened to the Child, and so it would be inappropriate for the Trial Court to reward Father's conduct by changing custody to Father.

Although the Trial Court made no explicit credibility findings as to Mother versus Father, we think it is implicit in the Trial Court's ruling that it found Father more credible than Mother. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

The question is whether the facts preponderate against the Trial Court's finding that there had been a material change in circumstances. After giving the appropriate deference to the Trial Court's credibility determinations, we cannot conclude that the evidence preponderates against the Trial Court's finding that there had been a material change in circumstances due to the Child's behavioral problems, including stealing and fighting, as well as the decline in his grades, the Child's stated preference for which parent he wanted to live with, as well as the apparent difficulty between the Child and his step-father.

The foregoing also leads us to conclude that the evidence does not preponderate against the Trial Court's finding that designating Father as the primary residential parent is in the

Child's best interest. Further, we also note Mother's response to Father's letter set forth previously in this Opinion where Mother clearly stated her refusal to discuss anything involving the Child with Father, except dire emergencies. Mother instructed Father to discuss the Child with Mr. Clark. Mother did this knowing full-well that Father and Mr. Clark were not, in a true understatement, on good speaking terms and were unable to get along. Mother's delegation to the Child's step-father of her parental duty to discuss the Child with Father causes this Court more than a little concern. While Mother may wish to rid herself of any further contacts with Father, they both are still the parents of their child. The best interests of the Child through the implementation of the Permanent Parenting Plan require a certain minimal level of communication between Mother and Father concerning the Child. Mother's unilateral decision to prohibit Father from communicating directly with her concerning the Child and instead requiring Father to communicate with Mr. Clark, an arrangement destined for trouble and failure from the start, is a significant factor in our decision to affirm the Trial Court's findings that there had been a material change of circumstances and that it is in the best interests of the Child for Father to be the primary residential parent of the Child.

We conclude that the evidence does not preponderate against the Trial Court's findings that there had been a material change in circumstances and that it was in the Child's best interest to designate Father as the primary residential parent. Accordingly, we affirm the Trial Court's judgment and pretermitt Mother's second issue.³

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Scarlett Reagan Aslinger Sampsel, and her surety.

D. MICHAEL SWINEY, JUDGE

³ While this appeal was pending, Mother filed a motion requesting this Court consider post-judgment facts, those facts being the Child's most recent and presumably improved grades. We deny Mother's motion to consider post-judgment facts.